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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/541,685	12/16/2005	Nadim C Moucharafieh	13892US	4043
24116	7590	08/17/2009	EXAMINER	
BATTELLE MEMORIAL INSTITUTE			SULLIVAN, DANIELLE D	
505 KING AVENUE			ART UNIT	PAPER NUMBER
COLUMBUS, OH 43201-2693			1616	
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08/17/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/541,685	<b>Applicant(s)</b> MOUCHARAFIEH ET AL.
	<b>Examiner</b> DANIELLE SULLIVAN	<b>Art Unit</b> 1616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

1) Responsive to communication(s) filed on 28 May 2009.

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

4) Claim(s) 1-27 and 51-57 is/are pending in the application.

4a) Of the above claim(s) 3,5,6,8-11,13-16,18-26 and 53-57 is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1,2,4,7,12,17,27 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO/SB/08)  
 Paper No(s)/Mail Date 5/28/2009

4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date \_\_\_\_\_

5) Notice of Informal Patent Application

6) Other: \_\_\_\_\_

**DETAILED ACTION**

Claims 1-27 and 51-52 are pending examination. Claims 1, 2, 4, 7, 12, 17, 27 and 51 and 52 are under examination. Claims 53-57 were added in the amendment filed 5/28/2009.

***Election/Restrictions***

Claims 3, 5, 6, 8-11, 13-16, 18-27 and 53-57 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 8/04/2008.

Applicant's election without traverse of a) methyl oleate, b) monoethanolamine, c) N, N-(dihydroxyethyl) oleylamine and d) N-(phosphonomethyl) glycine (glyphosate) in the reply filed on 8/04/2008 is acknowledged.

Newly submitted claims 53-57 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons:

Claim 53 requires that b) is a mixture of monoethanolamine and propylene glycol. Claim 56 pertain to a method that is independent and distinct from the previously elected composition because the method requires oil that has specific temperature range.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 56 and 57 are withdrawn from

consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 7, 17 and 27 are rejected under 35 U.S.C. 102(b) as being anticipated by Ward et al. (US 6,093,681).

Ward et al. teach composition comprising 20% glyphosate, Span 80 (surfactant), Tween 20 (polyoxyethylene sorbitol), butyl stearate (fatty acid ester) (Examples FC-1 and F-2).

Claims 1, 2, 4, 7, 17 and 27 are rejected under 35 U.S.C. 102(b) as being anticipated by Gillespie et al. (US 6,093,680).

Gillespie et al. teach composition comprising 20% glyphosate, Span 80 (surfactant), Tween 20 (polyoxyethylene sorbitol), methyl oleate (fatty acid ester) (Examples 12-17).

***Response to Arguments***

Applicant's arguments filed 5/28/2009 have been fully considered but they are not persuasive. Applicants argue neither Ward nor Gillespie describe microemulsions,

much less a non-aqueous oil-continuous microemulsion. Applicants state that although the same building blocks are used, how the formulation is put together is very different. Applicants argue that the words "non-aqueous, oil-continuous microemulsion" is substantive.

The Examiner does not find these arguments persuasive. First, the Examiner has noted that Ward teaches microemulsions as one of the forms that the composition may be formulated as (column 6, line 40). However, it is the Examiners position that the words "non-aqueous, oil-continuous microemulsion" is not substantive limitations which overcome the teachings of Ward and Gillespie.

MPEP 2111.02 states, "if the body of a claim fully and intrinsically sets forth all of the limitations of the claimed invention, and the preamble merely states, for example, the purpose or intended use of the invention, rather than any distinct definition of any of the claimed invention's limitations, then the preamble is not considered a limitation and is of no significance to claim construction." Furthermore, MPEP 2111.02 states, "preamble is not a limitation where a claim is directed to a product and the preamble merely recites a property inherent in the old product."

Hence, the recitation of the term "non-aqueous, oil-continuous microemulsion" does not give patentable weight to the instant claims because the claim does not limit the composition to a particular particle size to limit the composition to only being a microemulsion. The present claims are composition claims, not methods of making compositions. Thus, how the formulation is put together is not of issue. The issue is

whether the prior art composition comprises the components in the formulation as claimed. Presently claim 1 is anticipated by Ward and Gillespie.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Gillespie et al. (US 6,093,680) in view of Iwasaki (5,612,322).

**Applicant's Invention**

Applicant claims a composition as disclosed above. Claim 12 limits the polar solvent to an amine selected from ethylene diamine, ethanolamine, diethanolamine, triethanolamine and combination thereof.

**Determination of the scope and the content of the prior art  
(MPEP 2141.01)**

The teaching of Gillespie et al. is discussed in above 102(b) rejection.

**Ascertainment of the difference between the prior art and the claims  
(MPEP 2141.02)**

Gillespie et al. do not teach the use of an amine as the polar solvent. It is for this reason that Iwasaki is joined.

Iwasaki teaches that monoethanolamine, diethanolamine and triethanolamine are excellent activating agents for biocides in combination with monoesters, particularly polyoxyalkylene alkyl ethers (column 2, lines 5-16). The biocides include glyphosate (column 3, lines 29-31).

**Finding of prima facie obviousness**

**Rationale and Motivation (MPEP 2142-2143)**

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of Gillespie et al. and Iwasaki to utilize an amine, such as monoethanolamine. One would have been motivated to include monoethanolamine because Iwasaki teaches that the compound works as an activating agent in biocidal compositions comprising glyphosate.

Claims 51 and 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gillespie et al. (US 6,093,680) in view of Iwasaki (5,612,322), and in further view of Kuchikata et al. (US 6,228,807).

**Applicant's Invention**

Applicant claims a composition as disclosed above. Claims 51 and 52 specifies the polar solvent is monoethanolamine. Claim 51 specify that the amphiphilic material is selected from N, N-(dihydroxyethyl) oleylamine and polyoxyethylene oleyl ether. Claim 52 specifies the material is polyoxyethylene oleyl ether.

**Determination of the scope and the content of the prior art**

**(MPEP 2141.01)**

The teachings of Gillespie et al. and Iwasaki are addressed in above 103 rejection.

**Ascertainment of the difference between the prior art and the claims**

**(MPEP 2141.02)**

Gillespie et al. and Iwasaki do not teach polyoxyethylene oleyl ether, however, Iwasaki teaches the use of polyoxyalkylene alkyl ethers with activating agents, such as monoethanolamine. It is for this reason that Kuchikata et al. is joined.

Kuchikata et al. teach the use of specific surfactants in the formulation of N-phosphonomethylglycine herbicides (column 2, lines 58-65). The surfactants include polyoxyethylene oleyl ether (column 6, line 3).

**Finding of prima facie obviousness**

**Rationale and Motivation (MPEP 2142-2143)**

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of Gillespie et al., Iwasaki and Kuchikata et al. to further include polyoxyethylene oleyl ether. One would have been motivated to include polyoxyethylene oleyl ether because Kuchikata et al. teach that it is a suitable surfactant and since Iwasaki teach that polyoxyalkylene alkyl ethers are combined with activating agents such as monoethanolamine in glyphosate formulations.

***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Danielle Sullivan whose telephone number is (571) 270-3285. The examiner can normally be reached on 7:30 AM - 5:00 PM Mon-Thur EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on (571) 272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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